1-1-1970

The Presumption of Legitimacy as Affected by Standing, Antenuptial Conception, and the Lord Mansfield Rule

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Plaintiff brought a bastardy action against defendant seeking to have him declared the putative father of her child and therefore liable for its support. The only testimony was a deposition by the plaintiff, a formerly married woman, stating that prior to her marriage she had intimate relations exclusively with the defendant and at the time of her marriage to another man she was pregnant and her future husband knew of it. The husband then had the marriage annulled and subsequently the child whose legitimacy was in question was born. The trial court granted defendant's motion for a summary judgment stating that plaintiff was not an unmarried woman under the statute[1] and therefore the child is conclusively presumed legitimate. On appeal to the District Court of Appeal, Second District, *held*, reversed and remanded: The plaintiff, because of her annulment, is an unmarried woman and therefore has standing to sue. The presumption of legitimacy is rebuttable, not conclusive, the plaintiff's testimony can come in to rebut the presumption (dictum). *B.S.B. v. B.S.F.*, 217 So.2d 599 (Fla. 2d Dist. 1969).

The importance of the court's decision is threefold. First, a Florida court has, for the first time, reversed the heretofore uniform interpretation of Florida Statute section 742.011[2] and has given a formerly married woman (whose child was legally presumed conceived in wedlock) standing to sue in a bastardy proceeding. Prior to this decision the Florida courts have consistently interpreted this statute to mean that any mother whose child was conceived in wedlock, whether she was currently married at the time she brought the suit or not, had no standing to sue in bastardy proceedings.[3]

This rule of standing was created by a strange misinterpretation of case law. In the case of *Gossett v. Ullendorff*,[4] a sordid and distasteful probate fight occurred when a mother tried to bastardize her children by her own testimony. The court, with justified repulsion, said in ruling against the mother:

> Circumstances seem to us to be more analogous to *that condition in which through public policy a wife is not permitted to deny the parentage of children born during wedlock*. She cannot repudiate their legitimacy. That right belongs only to the father

1. FLA. STAT. § 742.011 (1967).

2. The exact words of the statute are:

Any unmarried woman who shall be pregnant or delivered of a bastard child, may bring proceedings in the circuit court, in chancery, to determine the paternity of such child.

3. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Kennelly v. Davis, 216 So.2d 795 (Fla. 3d Dist. 1968), *aff'd*, 221 So.2d 415 (1969); Illgen v. Carter, 123 So.2d 368 (Fla. 2d Dist. 1960); Sanders v. Yancy, 122 So.2d 202 (Fla. 2d Dist. 1960).

4. 114 Fla. 159, 154 So. 177 (1934).

> because maternity is never uncertain. She may only contest the identity of the child.[5]

What the court had clearly been alluding to was the Lord Mansfield Rule which prevents the testimony of the parents from bastardizing the child. Subsequent case law, however, resulted in a gross misunderstanding which developed into another "bastard rule." The case of *Eldridge v. Eldridge*[6] interpreted *Gossett* as creating a rule of standing whereby Florida will allow only the father or putative father, but not the mother, the right to contest a child's legitimacy when the child is born in wedlock. This construction was completely unwarranted, for with the exception of Louisiana[7] there is no local or foreign precedent restricting standing to either party because of sex. On the contrary, the general rule is that either party could contest legitimacy.[8] Since the *Eldridge* decision all subsequent Florida cases dealing with this question have adopted its interpretation.[9]

In the instant case the court failed to spell out the reasoning behind its decision on the standing question.[10] This leaves the holding open to various interpretations. The two most likely are (1) that the court gave a literal interpretation to the word "unmarried," *i.e.*, the plaintiff only need be unmarried at the time the suit is brought rather than at the time the child was conceived;[11] or (2) the court in rejecting the Lord Mansfield Rule not only accepted the wife's testimony to rebut the presumption of legitimacy but also to show that the child was conceived out of wedlock, thus giving the mother standing to sue. Whatever the reason for the court's decision on the standing question, the court proceeded to rule on the substantive issues in the case—the presumption of legitimacy and the Lord Mansfield Rule.

The conclusive presumption of legitimacy was brought into the English common law from a maxim of Roman Law.[12] However, since it was a conclusive presumption, it wrought absurd results during the early

5. *Id.* at 169, 154 So. at 181 (emphasis added).

6. 153 Fla. 873, 16 So.2d 163 (1944).

7. Louisiana, under civil law, has a similar rule. It probably arose because of the emphasis given by Lord Mansfield when he said "especially the mother who is the offending party." See note 49 *infra*. Eloi v. Mader, 1 Rob. 581 (Va. 1841); Succession of Barth, 178 La. 847, 152 So. 547 (1934).

8. Wright v. Hicks, 15 Ga. 160 (1854). However, many states by statutory authority have limited the right of a woman to bring suit in bastardy proceedings on the basis of whether she was married or not. *See* Annot., 98 A.L.R.2d 256 (1964).

9. Kennelly v. Davis, 216 So.2d 795 (Fla. 3d Dist. 1968), *aff'd*, 221 So.2d 415 (Fla. 1969); Illgen v. Carter, 123 So.2d 368 (Fla. 2d Dist. 1960); Sanders v. Yancy, 122 So.2d 202 (Fla. 2d Dist. 1960).

10. The court simply referred to Annot., 98 A.L.R.2d 256, 262-64 (1964).

11. This is the more likely reason, since the annotation to which the court referred mentions a similar Kansas statute in which the state court construed "unmarried" to refer to the mother's status at the time the suit was brought. Blush v. State, 4 Kan. App. 145, 46 P. 185 (1896); Willets v. Jeffries, 5 Kan. 470 (1870).

12. Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437 (1962).

English common law period.[13] Gradually two classic exceptions evolved —physical absence for so long a period before birth as to make it a natural impossibility that the husband could be the father, and impotency.[14] This resulted in the presumption becoming rebuttable rather than conclusive upon the proof of nonaccess or impotency.[15] Further attempts to bring the presumption in step with reality resulted in expansion of the circumstances upon which a case of nonaccess could be established.[16]

The next major development of the presumption of legitimacy was its application to cases where a child was conceived prior to the marriage of its parents but born in wedlock.[17] In *Rex v. Luffe*[18] the court, in extending the presumption to antenuptial conception, explained that the child would be legitimate regardless of how many days or months after the marriage the child is born, subject, however, to bastardization by proof of impotency or nonaccess. The court went on to say that the presumption's application to antenuptial conception is a carryover from civil law, and its purpose is to establish the parentage of the child.[19] In the same vein, a court in a later English case pointedly exclaimed that

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13. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 398-99 (2d ed. 1898). An example of the absurdity that resulted when the presumption was conclusive is the story of St. Hugh of Lincoln. A knight who was away three years returned and found his wife had given birth to a child the day before he returned. The court, evoking the presumption, held that the child was legitimate, saying the privities of husband and wife are not to be known to others. *Id.*

14. Comment, note 12 *supra*. This was the famous doctrine of "within the four seas," according to which the child was conclusively presumed legitimate no matter how long the parents were apart as long as both parents were within the four seas of England, *i.e.*, within the King's jurisdiction. For a complete historical survey *see* F. POLLOCK & F. MAITLAND note 13, *supra*.

15. Pendrell v. Pendrell, 2 Strange 925, 93 Eng. Rep. 945 (1732).

16. Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Rep. 457 (1846). The court, in modifying the strict requirement of non-access that only proof of natural impossibility could rebut the presumption, states:

> A child born in wedlock is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly rebutted by showing that the husband was first, incompetent; secondly, entirely absent, so as to have no intercourse or communication of any kind with the mother; thirdly, entirely absent at the period during which the child must, in the course of nature, have been begotten; fourth, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. *Id.* at 555, 50 Eng. Rep. 458.

17. Rex v. Luffe, 8 East 198, 103 Eng. Rep. 316 (1807); Anonymous v. Anonymous, 23 Beav. 273, 53 Eng. Rep. 167 (1856).

18. 8 East 198, 103 Eng. Rep. 316 (1807).

19. In discussing the rationale for the extension of the presumption to antenuptial conception cases the court stated:

> With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands on its own peculiar grounds. The marriage of the parties is the criterion adopted by the law, in the cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage. *Id.* at 207, 103 Eng. Rep. at 321.

the husband's reactions subsequent to the child's birth carry great weight in determining whether the presumption has been rebutted.[20]

The presumption soon moved across the Atlantic and was accepted, without reservation by every jurisdiction in the United States.[21] Somewhere along the way, however, a misnomer arose. Many courts continued to apply the words "conclusive presumption" to the already evolved rebuttable presumption.[22] What occurred, in effect, was that the courts said that the presumption was conclusive, subject, however, to certain exceptions; namely, to the same proof of circumstances of nonaccess and impotency that rebutted the presumption in England.[23]

It is sometimes contended that the presumption actually was conclusive in some jurisdictions, but upon close inspection of many of the "leading" cases it appears that such statements were (1) dicta,[24] (2) applicable when the husband had knowledge of the wife's pregnancy prior to the marriage,[25] or (3) simply an example of using the word "conclusive" too loosely.[26] The overwhelming majority of cases, however, expressly recognized the presumption as rebuttable.[27]

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20. Anonymous v. Anonymous, 23 Beav. 273, 53 Eng. Rep. 167 (1856).

21. Stegall v. Stegall, 22 F. Cas. 1226 (No. 13351) (U.S. 1825); Kennedy v. State, 117 Ark. 113, 173 S.W. 842 (1915); Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903); *In re* Osborn's Estates, 185 Iowa 1307, 168 N.W. 288 (1918); Goss v. Froman, 89 Ky. 318, 12 S.W. 387 (1889); Hubert v. Clouatier, 135 Me. 230, 194 A. 303 (1937); Scanlon v. Walske, 81 Md. 118, 31 A. 498 (1896); Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862); Rabeke v. Baer, 115 Mich. 328, 73 N.W. 242 (1897); Rhyne v. Hoffman, 59 N.C. 385 (1862).

The following jurisdictions no longer follow the common law rule of the presumption of legitimacy, but have incorporated the rule into statutory form and follow it as such: CAL. CODE CIV. PROC. § 1963-31 (Deering 1967); GA. CODE ANN. § 3012 (1966); MONT. REV. CODES ANN. § 61-101 (1962); N.D. CENT. CODE § 14-09-01 (1960); OKLA. STAT. ANN. § 10.1 (1966); WISC. STAT. ANN. § 328.39 (1958).

22. Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); State v. Romaine, 58 Iowa 48, 11 N.W. 721 (1882); State v. E.A.H., 246 Minn. 299, 75 N.W.2d 195 (1956); Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949); State v. Herman, 35 N.C. 337, 13 Ired. Law 502 (1852).

23. *See* note 22 *supra*.

24. Rhyne v. Hoffman, 59 N.C. 335 (1862); State v. Herman, 35 N.C. 337, 13 Ired. Law 502 (1852). In both cases the court said that when a man marries an obviously pregnant woman and the child is born in wedlock it is conclusively presumed to be his on the theory that by his subsequent act of marriage he is acknowledging the child as his; but in both cases the court found that the wives were not obviously pregnant, and thus the presumption was rebuttable. *But see* West v. Redmond 171 N.C. 742, 88 S.E. 341 (1916).

25. State v. Shoemaker, 62 Iowa 343, 17 N.W. 589 (1883); Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949) (premarital sex, as well as knowledge of future wife's pregnancy); Miller v. Anderson, 43 Ohio St. 473, 3 N.E. 605 (1885). *Contra*, Roth v. Roth, 21 Ohio St. 646 (1871).

26. State v. Romaine, 58 Iowa 48, 11 N.W. 721 (1882); State v. E.A.H., 246 Minn. 299, 75 N.W.2d 193 (1956).

27. Stegall v. Stegall, 22 F. Cas. 1226 (No. 13351) (U.S. 1825); Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903); Phillips v. State, 82 Ind. App. 356, 145 N.E. 895 (1925); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Clark v. State, 208 Md. 316, 118 A.2d 366 (1955). For a more complete listing of all jurisdictions, see Annot., 57 A.L.R.2d 729 (1958).

The American courts, like the English courts, were soon applying the presumption of legitimacy to cases of antenuptial conception.[28] The rationale most often given for the application of the presumption to this area was, again, to establish the parentage of the child so that the child would have a name as well as support, thus saving the public this expense. A second reason was to protect the family unit if possible.[29]

In applying the presumption to cases of antenuptial conception, the overwhelming majority of cases held that the presumption was in no way weakened.[30] The small minority of cases holding the other way, *i.e.*, that when the presumption is applied to antenuptial cases it is weakened and less proof is needed to rebut it,[31] were generally based on the spurious reasoning that there was a greater likelihood that anyone could be the father.[32]

Since the adoption of the presumption in antenuptial and postnuptial situations in America there has been an expansion, beyond nonaccess and impotency, of the type of evidence that can be used to rebut the presumption. Today courts have accepted the following types of evidence: (1) conduct of the parents at the child's birth;[33] (2) physical characteristics of the legal and putative father;[34] (3) scientific proof;[35] and (4) competent testimony bearing upon the question.[36]

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28. Jacobs v. Jacobs, 146 Ark. 45, 225 S.W. 22 (1920); *In re* Ruff's Estate, 159 Fla. 777, 32 So.2d 840 (1947); Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903); *In re* Osborn's Estate, 185 Iowa 1307, 168 N.W. 288 (1918); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Clark v. State, 208 Md. 316, 118 A.2d 366 (1955); Dennison v. Page, 29 Pa. 420 (1857).

29. He is deprived of all of the benefits of a father and the legal right to support from him, leaving that responsibility to the mother, who is usually less able to provide for him. This and other important factors, including the preservation of the integrity of the family unit and harmony within it, provide the strongest considerations for favoring legitimacy and for discouraging litigation in such matters except in the clearest cases. For these reasons the presumption still remains one of the strongest known to the law.

Holder v. Holder, 9 Utah 2d 163, 165, 340 P.2d 761, 763 (1959).

30. Jacobs v. Jacobs, 146 Ark. 45, 225 S.W. 22 (1920); Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Stone v. Stone, 193 Okla. 458, 145 P.2d 212 (1944); Dennison v. Page, 29 Pa. 420 (1857); Moore v. Moore, 299 S.W. 653 (Tex. Civ. App. 1927).

31. Wright v. Hicks, 15 Ga. 160, (1854); Coury v. Felix, 276 Minn. 125, 149 N.W.2d 92 (1967); *In re* McDermott's Estate, 125 Neb. 179, 249 N.W. 555 (1933); Wilson v. Babb, 18 S.C. 59 (1882); Jackson v. Thorton, 133 Tenn. 36, 179 S.W. 384 (1915). In this latter case, the court clearly spelled out why it considered antenuptial conception as weakening the presumption.

Some of the courts hold that the presumption in such cases must arise from the fact of the marriage and not from the sexual intercourse assumed to result from the marriage, and that the presumption of legitimate birth is therefore so far weakened that it may be overcome by a lesser weight of evidence. *Id.* at 38, 179 S.W. at 384.

32. Wright v. Hicks, 15 Ga. 160 (1854).

33. *Id.*

34. Stillie v. Stillie, 119 Kan. 816, 244 P. 844 (1925).

35. State v. E. A. H., 246 Minn. 299, 75 N.W.2d 195 (1956).

36. Pursley v. Hisch, 119 Ind. App. 232, 85 N.E.2d 270 (1949); *In re* Findley's Estate 253 N.Y. 1, 170 N.E. 471 (1930).

Another factor affecting the presumption as applied in antenuptial situations is the husband's knowledge of his wife's pregnancy prior to or at the time of marriage. It has already been mentioned that certain jurisdictions consider that knowledge of the pregnancy by the husband makes the presumption conclusive.[37] This was reiterated again in *State v. Shoemaker*,[38] where the court held that

> [a] husband who in the manner we have indicated has put himself in loco parentis of a bastard child of his wife ought not be permitted to disturb the family relationship and bring scandal upon his wife and her child, by establishing its bastardy after he condoned the wife's offense by taking her in marriage.[39]

The majority of cases, however, seem to agree that despite the husband having knowledge of his wife's pregnancy, the presumption is still rebuttable albeit more difficult to rebut.[40] Correspondingly, ignorance of the future wife's pregnancy shown by proof or by subsequent acts of the father has been held enough to rebut the presumption.[41]

Another interesting factor applicable to antenuptial conception is that there is no time limit on the number of months or days prior to birth (when the prior conception must have occurred) for the presumption to attach, as long as the child is born in wedlock.[42] This raises problems when, as in the instant case of *B.S.F.*, the conception is prior to the marriage but the birth is after the annulment. The general rule appears to be that the marital status continues for sometime afterward,[43] but there are no cases on point where the conception is antenuptial and the birth post marital. There are, however, many cases where separated or divorced wives have given birth to children within a reasonable time after the divorce or separation, and the children have been presumed legitimate.[44] The two Florida cases[45] dealing with antenuptial conception have established that the presumption, despite being "one of the strongest known to law," is rebuttable, and that antenuptial conception in no way

37. *See* note 25 *supra.*

38. 62 Iowa 343, 344, 17 N.W. 589, 590 (1883).

39. *Id.*

40. Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 721 (1882); Dennison v. Page, 29 Pa. 420 (1857). *See* notes 27 and 30 *supra.*

41. Wright v. Hicks, 15 Ga. 160 (1854); Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862).

42. Stegall v. Stegall, 22 F. Cas. 1226 (No. 3351) (U.S. 1825) (6 months); Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903) (15 days); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908) (4 months); Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862) (5 months); Phillips v. Allen, 84 Mass. (2 Allen) 453 (1861) (8 months); Dennison v. Page, 29 Pa. 420 (1857) (3 months).

43. *In re* Julian's Estate, 189 Kan. 94, 333 P.2d 432 (1959); People v. Bedell, 342 Mich. 398, 72 N.W.2d 808 (1955).

44. Balance v. Balance, 261 Ala. 97, 72 So.2d 851 (1954); State v. Bowman, 230 N.C. 203, 52 S.E.2d 345 (1949); Plato v. Plato, 205 Misc. 497, 132 N.Y.S.2d 829 (Dom. Rel. Ct. 1954); Smith v. Smith, 71 S.D. 305, 24 N.W.2d 8 (1945).

weakens the application of the presumption.[46] It may be assumed that Florida follows the established trend as it relates to all aspects of the rebuttable presumption of legitimacy. Therefore, non-Florida cases upholding legitimacy where there is antenuptial conception and prenatal divorce would indicate that the annulment prior to the birth in *B.S.F.* is irrelevant to the presumption of legitimacy.

There is still a third issue involved in the principal case; the renunciation of the Lord Mansfield Rule, by dictum, so as to allow either parent to testify as to their child's legitimacy.[47] The rule, stated simply, is that neither parent may testify to information that would bastardize their children. The rule was established and derived its name from the famous case of *Goodright v. Moss*,[48] wherein the eminent jurist, Lord Mansfield, denounced the right of either parent to bastardize their child based on the grounds of "decency, morality and public policy."[49] Historically, however, Lord Mansfield misconstrued precedent because prior to his rule parents were allowed to testify and bastardize their children.[50] There were some major cases prior to his pronouncement that refused to allow the "uncorroborated" testimony of parents to bastardize the child by rebutting the presumption of legitimacy,[51] but Lord Mansfield's statements were more than a step forward; they embodied a brand new rule. The fact that there was no historical precedent to support his statement forms one of the major arguments by those who favor abolishing the rule.[52]

The rule, despite its creation after the Declaration of Independence,[53] was soon widely adopted throughout America and applied to both parents in any type of legal situation where a child could be

45. *In re* Ruff's Estate, 159 Fla. 777, 32 So.2d 840 (1947); Eldridge v. Eldridge, 153 Fla. 873, 16 So.2d 163 (1944).

46. *See* note 45 *supra*.

47. B. S. B. v. B. S. F., 217 So.2d 599 (Fla. 2d Dist. 1969).

48. 2 Cowp. 591, 98 Eng. Rep. 1257 (1777).

49. The famous quote in full is:

> As to the time of birth the father and mother are the most proper witnesses to prove it. But, it is a rule founded in decency, morality and policy that they shall not be permitted to say, after marriage, that they have had no connection and therefore that their offspring is spurious; more especially the mother who is the offending party. *Id.* at 594, 98 Eng. Rep. at 1258.

50. 3 R.C.L. *Bastards* § 6 (1929).

51. Rex v. Rook, 1 Wils. 340, 95 Eng. Rep. 651 (1752); Rex. v. Bedel, Cas. T. Har. 379, 95 Eng. Rep. 245 (1737).

52. Dean Wigmore is the greatest antagonist towards Lord Mansfield's rule, and one of the strong points of his attack is the historical mistake Lord Mansfield made in assuming precedent was on his side.

> The story of the rule that parents may not bastardize their issue is a singular one, though it has had some parallels in other parts of our law. First, a settled rule then a chance judicial expression, in apparent contradiction, then a series of rulings based on a misunderstanding of this expression and an ignoring of the settled rule; then an entirely new rule, and new and wondrous reasons contrived and put forward to defend the novelty, as if it had from the beginning been based on the experience and wisdom of generations.

4 J. WIGMORE, EVIDENCE § 2064 at 387-88 (3d ed. 1940).

53. All English common law prior to the Declaration of Independence was adopted in 1776, but in this instance the case was accepted although it was decided in 1777.

bastardized.[54] This was true whether or not either parent was dead.[55] The adoption of the rule, however, did not preclude bastardization of the child; it simply prevented the husband and wife from doing so directly.[56] The court, in implementing the rule, was actually excluding testimony of either parent that could rebut the presumption of legitimacy, *i.e.*, any testimony tending to prove impotency or nonaccess.[57] Either parent's testimony could come in, however, to prove issues other than legitimacy of the child such as seduction[58] or adultery.[59] The fact that such sordid testimony can and often does come into evidence illustrates the inaccuracy in Lord Mansfield's assumption that the rule would promote decency and morality.[60] A careful study of the rationale employed by the courts in the application of the rule seems to point to an emphasis on concern for the child[61] and considerations of public policy.[62] The rule, like the presumption of legitimacy, was extended with the same potency to cases involving antenuptial conception.[63]

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54. Kennedy v. State, 117 Ark. 113, 173 S.W. 842 (1915) (mother's testimony in bastardy proceedings excluded); Taylor v. Whittier, 240 Mass. 514, 138 N.E. 6 (1922) (husband's testimony in a probate case excluded); Scanlon v. Walske, 81 Md. 118, 31 A. 498 (1896) (wife's testimony in probate case was excluded); Rabeke v. Baer, 115 Mich. 328, 73 N.W. 242 (1897) (wife's testimony in seduction case excluded); Egbert v. Greenwalt, 44 Mich. 245, 6 N.W. 654 (1880) (both parents' testimony excluded in a criminal conversation case); Palmer v. Palmer, 79 N.J.Eq. 496, 82 A. 358 (1912) (husband's testimony in an annulment case excluded); Mink v. State, 60 Wis. 583, 19 N.W. 445 (1884) (wife's testimony in bastardy case excluded). The English have also extended the rule to divorce cases. Russell v. Russell, [1924] A.C. 687.

55. Rex v. Kea, 11 East 132, 103 Eng. Rep. 954 (1809). The reasoning given was that the death of either parent is irrelevant in regard to the rule's application, since the purpose of the rule is not to prevent family dissension but rather to help the child and the public.

56. Palmer v. Palmer, 79 N.J. Eq. 496, 82 A. 358 (1912). The court restricted the rule only to "direct" testimony of either parent. "It does not prevent the admission of evidence on the subject from other sources, but it does prevent the parties from stultifying themselves and committing fraud upon each other and upon their children." *Id.* at 498, 82 A. at 359.

57. *See* note 54 *supra.*

58. Rabeke v. Baer, 115 Mich. 328, 73 N.W. 242 (1897).

59. Kreighbaum v. Dinsmore, 88 Ind. App. 693, 165 N.E. 526 (1929); Koffman v. Koffman, 193 Mass. 593, 79 N.E. 780 (1907).

60. Dean Wigmore also mounts a strong attack against the rule on this point. His argument is reprinted and accepted in Lynch v. Rosenberger, 121 Kan. 601, 249 P. 682 (1926). *See* Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937).

61. Tioga County v. South Creek Township, 75 Pa. 433 (1874). The court said the reason for the rule was to prevent unseemly and scandalous testimony; not because it reveals the parents immoral conduct, but because of the effect it may have on the children who would suffer through no fault of their own.

> That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency and hence the rule of law which forbids it. *Id.* at 437.

62. *In re* Wright, 237 Mich. 375, 211 N.W. 746 (1927).

> [W]e think the rule is a good one on the ground of public policy. The Mansfield rule undoubtedly lessens the number of public charges which would have to be cared for and supported by the public. It works for peace and quiet of the family. It works for the peace of the community and society generally and the state has passed legislation which has advanced and supported these reasons all of which we apprehend may be construed as showing a public policy. *Id.* at 748-49.

63. Kreighbaum v. Dinsmore, 88 Ind. App. 693, 165 N.E. 526 (1929); Wallace v. Wallace, 173 Iowa 37, 114 N.W. 527 (1908); People v. Bedell, 342 Mich. 398, 72 N.W.2d

Despite this wide acceptance of the rule as previously indicated, it has not gone unchallenged, and for good reason. A definite trend away from the rule has grown, led by Dean Wigmore's objections on historical as well as equitable grounds.[64] Some cases have reversed the rule simply on the strength of Dean Wigmore's argument.[65] Others have abrogated it on the grounds that it is contrary to common sense and the best evidence rule.[66] States have also overruled the rule by statutory construction or interpretation.[67] Still other courts simply make various exceptions to the Lord Mansfield Rule but do not overrule it entirely.[68] The English themselves appear to have restricted the operation of the rule in certain circumstances on the basis that it causes an injustice to the husband.[69]

Looking at the current case law that involves the rule, it becomes obvious that it is still firmly entrenched in a majority of jurisdictions;[70] however, the slow process of overturning precedent is continuing.[71] In *Peters v. District of Columbia*,[72] the court said that basic fairness and logic is found in Dean Wigmore's position.

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808 (1955); Yanoff v. Yanoff, 237 Mich. 383, 211 N.W. 735 (1927); State v. Herman, 35 N.C. 337, 13 Ired. Law 502 (1852); Tioga County v. South Creek Township, 75 Pa. 433 (1874); Dennison v. Page, 29 Pa. 420 (1857).

64. *See* notes 52 and 60 *supra*.

65. *See* note 60 *supra* and Stillie v. Stillie, 119 Kan. 816, 244 P. 844 (1925). Both Kansas cases, however, have been overruled by Martin v. Stillie, 129 Kan. 19, 281 P. 925 (1929).

66. Nolting v. Holt, 113 Kan. 495, 215 P. 281 (1923); Moore v. Smith, 178 Miss. 383, 172 So. 316 (1932). The court was quite clear as to why it abrogated the rule:

> The evidence here under consideration is relevant and comes from persons who best know the truth of the matter under consideration, *i.e.*, whether they had opportunity for access to each other at the time the child was begotten. The exclusion of this evidence therefore would obstruct and not facilitate the search for truth. It should therefore be admitted unless its exclusion is clearly demanded by some specific important extrinsic policy against which every intendment should be made.

Moore v. Smith, 178 Miss. at 389, 172 So. at 319. *See also* State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955) (dissenting opinion).

67. State v. Soyka, 181 Minn. 533, 233 N.W. 300 (1930); *In re* Wray, 93 Mont. 525, 19 P.2d 105 (1933); Louden v. Louden, 114 N.J. Eq. 242, 168 A. 840 (1937). For a full discussion and list of cases on this point, see Annot., 60 A.L.R. 390 (1929); Annot., 89 A.L.R. 912 (1934).

68. Nulman v. Cooper, 120 Colo. 98, 207 P.2d 814 (1949) (allowed wife's testimony bastardizing the child because the husband had so testified in a previous action); People v. Dile, 347 Ill. 23, 179 N.E. 93 (1931) (allowed wife but not husband to testify, on the ground that husband would try to relieve himself of the burden to support the child and the burden would then fall on the public); New York v. Nelson, 124 Misc. 800, 210 N.Y. 335 (1924) (held that a parent can testify to bastardize the child if cross examined by the other parent).

69. Paulett Porrage Case, [1903] 1 A.C. 395, held that when a man marries a pregnant women that is not visibly enceinte and he did not know of the pregnancy, the rule does not apply to prevent fraud against the husband.

70. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); State v. Wade, 264 N.C. 144, 141 S.E.2d 34 (1965); Leider v. Leider, 210 Pa. Super. 433, 233 A.2d 917 (1967); Barr's Next of Kin v. Cherokee, Inc., 220 S.C. 447, 68 S.E.2d 440 (1951); Esparza v. Esparza, 382 S.W.2d 162 (Tex. Civ. App. 1964).

71. Vasquez v. Esquibel, 120 Colo. 98, 346 P.2d 293 (1959). Peters v. District of Columbia, 84 A.2d 115 (D.C. 1951); Ventresco v. Bushey, 159 Me. 241, 191 A.2d 104 (1963).

72. 84 A.2d 115 (D.C. 1951).

> For what avail would it be to open the front door of the court to a woman and allow her to enter and lodge a complaint and then at the critical point of the trial itself, seal her lips and forbid her to tell the fundamental facts of the case.[73]

What is perhaps the strongest indictment yet by a court against the Lord Mansfield Rule is stated in the case of *Ventresco v. Bushey*:[74]

> We do not lightly cast aside a rule of evidence which has never before been challenged by our court. But in the face of facts such as are apparent in the instant case where blind adherence to an illogical doctrine can result only in the "suppression of the truth and the defeat of justice," we are constrained to reconsider and abolish the rule. We now hold that both husband and wife may testify both as to his nonaccess to her and as to facts which tend to prove that access was impossible.[75]

Because of the previously discussed "bastard" rule of standing and because of the fact that it is usually the wife who would bring suit to gain support for her child, the Lord Mansfield Rule had never been tested in any prior Florida case.

In the instant case, after the court proceeded through accident, ignorance, or misconception to hopefully deal a deadly blow to the archaic rule of standing, it overruled the Lord Mansfield Rule and held the presumption of legitimacy rebuttable. But instead of delineating the two rules, the court, in apparent confusion, spoke as if there was but one rule. In trying to place the presumption of legitimacy in its proper perspective within the twentieth century, the court not only held that the presumption was rebuttable, as precedent had already established in Florida, but also removed the presumption from its exalted position.[76] To achieve this result the court, whether intentionally or not, reduced the stringent requirements not only as to the degree of proof necessary to rebut the presumption but also as to the type of evidence that could be entered to rebut the presumption. The court either out of ignorance or through a conscious but dimly defined progressive bent, then proceeded to include the wife's testimony bastardizing her child as competent testimony, thereby overruling Lord Mansfield's Rule. The reasoning given was that neither the woman alone nor the taxpayers should suffer because of an evening's pleasure. This was probably the same reason used to overrule the standing requirement. Whatever the actual reason was for the blending of the two rules the result achieved should be encouraged and supported, not simply because both rules are old and useless, but also because justice is more likely to be achieved by this progressive application of both rules.

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73. *Id.* at 120.
74. 159 Me. 241, 191 A.2d 104 (1963).
75. *Id.* at 249-50, 191 A.2d at 108.
76. *See* note 45 *supra.*